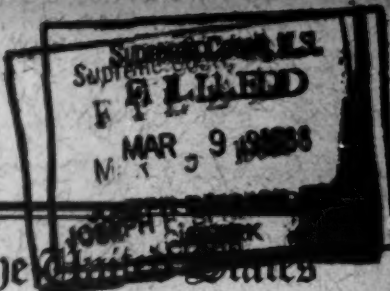


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No. 87-1157



the Court of the United States

OCTOBER TERM, 1987

ON OF NATIVES, ET AL., PETITIONERS

v.

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D OUTDOOR COUNCIL, INC., ET AL.

OR A WRIT OF CERTIORARI TO THE
STATES COURT OF APPEALS
R THE NINTH CIRCUIT

FEDERAL RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1157

ALASKA FEDERATION OF NATIVES, ET AL., PETITIONERS

v.

ALASKA FISH AND WILDLIFE
FEDERATION AND OUTDOOR COUNCIL, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 829 F.2d 933. The memorandum opinion of the district court (Pet. App. 33-58) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1987. The petition for a writ of certiorari was filed on January 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1916, the United States and Great Britain, acting on behalf of Canada, signed a convention in which they agreed to protect migratory birds from "indiscriminate slaughter" and to insure their preservation.

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convention to allow hunting, taking, * * * or export of any [migratory] bird * * * (16 U.S.C. 704).¹

Following the MBTA's enactment, the Secretary of Agriculture adopted regulations specifying "when, to what extent, * * * and by what means" migratory birds could be hunted. Proclamation of July 31, 1918, 40 Stat. 1812.² These regulations create a limited waterfowl hunting season for the State of Alaska and establish bag limits on the number of waterfowl a person can take in one day.³ They make an exception, however, for the taking of certain migratory nongame (but not game) birds by Native Alaskans.⁴ The regulations have been periodically revised

¹ In addition to the Canadian convention, the MBTA and related statutes implement hunting conventions with Mexico, Japan, and the Soviet Union. See 16 U.S.C. 703 *et seq.*; 16 U.S.C. 712, 715j. The four treaties differ considerably with respect to the issue in this case—*i.e.*, with respect to subsistence hunting by Native Alaskans.

² Section 3 of the MBTA provided that implementing regulations could become effective when approved by the President. See 16 U.S.C. 704. Thus, from 1918 until 1950, MBTA regulations were issued by Presidential proclamation. In 1951, however, the President empowered the Secretary of the Interior to promulgate regulations without prior approval, ratification, or other action of the President. See Exec. Order No. 10,250, 3 C.F.R. 755 (1949-1953 Comp.).

³ Regulation 4 (40 Stat. 1814) provides, in pertinent part:

The open seasons for waterfowls (except wood ducks, eider ducks, and swans) coot, gallinules, and Wilson snipe or jacksnipe shall be as follows:

* * * * *

In Alaska the open season shall be from September 1 to December 15.

⁴ Regulation 7 (40 Stat. 1816) provides:

In Alaska Eskimos and Indians may take for the use of themselves and their immediate families, in any manner and at any time, and possess and transport auks, auklets, guillemots, murres, and puffins and their eggs for food, and their skins for clothing.

over the years, but the closed season established for game birds in Alaska. 1921, 42 Stat. 2240; 1922, 43 Stat. 2265; Proclamation 1915-1916; Proclamation 1961-1962; Proclamation 2579-2580.

2. In January 1921, the Game Law (AGL), chapter 192 *et seq.* (repealed) made it unlawful for any person to offer to sell, purchase, or transport any animal, land fur-bearing animal, or any nest or egg thereof, or any nest or egg thereof, unless permitted by the statute. Pursuant thereto (43 Stat. 743), the Secretary authorized the Secretary to make regulations determining "what animals are game and what means" game animals. The regulations provided that game birds, nongame birds, and mammals could be taken, possessed, or transported (43 Stat. 743). Section 192 provided that no regulation could "prevent any hunter, sportsman, or traveler from obtaining game or close[d] season when the game is scarce or other food is not available." The Secretary determined "that the supply of game is in danger of extermination unless the law could "contravene any

⁵ This provision was amended by the Game Law, 43 Stat. 845, 54 Stat. 1103-1104, to prohibit the taking of animals out-of-season "when the supply of game is not sufficient food is not available."

and regulations" (43 Stat. 744). Section 1 provided "[t]hat the provisions of existing laws for the protection of * * * birds, and nests and eggs of birds in Alaska shall remain in full force and effect for a period of ninety days from the date of the passage of the Secretary of Agriculture and the provisions of this Act" (43 Stat.

Sections adopted to implement the AGL. The Alaska game law (act of January 13, 1906) and regulations thereunder supersede all laws and regulations for the protection of fur-bearing animals, and birds in the Territory. [M]igratory [B]ird [T]reaty [A]ct of 1918 (43 Stat. 755), * * * and the regulations under the Game Law and Regulations and Regulations for Game and Birds In The Territory (43 Stat. Exh. E)). These regulations further provide that an Indian, Eskimo, or half-breed who has adopted a civilized mode of life by exercising the right of franchise, and who is a hunter, or traveler may take animals or birds of the Territory at any time for food or for the need of food and other food is not to be taken" (*id.* Reg. 8). Nineteen years later, the AGL was amended to exclude migratory birds (43 Stat. 5270, 5271 (1944)). As amended, the AGL remained in effect until 1960, when all regulations under the AGL were deleted from the Code of Federal Regulations as having been "superseded by the Alaska Statehood Act (Act of July 1958; 25 Fed. Reg. 7681 (1960)). The United States Fish and Wildlife Service (FWS) is charged with the responsibility for administering and enforcing the

A (Pet. App. 7). In this regard, the FWS has long taken the position that the MBTA prohibits the harvesting of migratory birds between March 10 and September 1 of each year (*ibid.*). The FWS has also recognized, however, that subsistence hunters in Alaska have great needs for game meat in the spring and summer months and that cultural and geographic considerations render traditional enforcement methods ineffective in the vast reaches of Alaska (*ibid.*). Accordingly, in recent years, it has expended its limited resources on efforts to ensure compliance with the MBTA in Alaska (*ibid.*).

The FWS has, however, taken steps to reduce the take of declining migratory bird species (Pet. App. 8). Thus, in January 1984, the FWS entered into an agreement — called the Cooper Bay Agreement — with the Alaska Department of Fish and Game (ADF&G), the California Department of Fish and Game (CDF&G), and the Association of Game Council Presidents of Alaskan Natives to limit the taking of four species of migratory game birds — the cackling Canada geese, brant, white-fronts, and emperor geese — during the 1984 season (*ibid.*). While not prohibiting all takings of such species, the agreement placed a moratorium on all harvesting of cackling Canada geese; prohibited all egg gathering for cackling Canada geese, brant, and white-fronts; imposed a fifty-percent reduction in the open season sport-hunting harvest of brant and white-fronts; and barred closed season subsistence hunting of these two species during nesting, rearing, and molting periods (*ibid.*; see also Excerpt of Record (ER) Tab 24). The FWS renewed and refined these agreements in 1985 and in the succeeding season (Pet. App. 8).

Before the 1984 nesting season began, however, two nonprofit Alaskan corporations, the Alaska Fish and Wildlife Conservation Fund, Inc. (the Fund), and the Alaska Fish and Wildlife Federation and Outdoor Coun-

inc. (the Council), filed suit in district court against the Director of the FWS and the Commissioner of the F&G (Pet. App. 8-9). They sought to have the district court enjoin the FWS from acquiescing in the taking of migratory birds by Native Alaskans, for subsistence purposes or otherwise, and to declare that the FWS must comply with the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, before entering into any agreements in which takings of migratory birds are allowed (Pet. App. 8-9). Shortly thereafter, the Alaska Federation of Natives, the Association of Village Council Presidents, and Alaska State Representative Tonya intervened and cross-claimed against the FWS; they sought to have the district court declare that the AGL (rather than the MBTA) governs subsistence hunting of migratory game birds in Alaska and that, until the Secretary of the Interior adopts regulations pursuant to the Fish and Wildlife Improvement Act of 1978 (FWIA), Pub. L. No. 95-616, 92 Stat. 3110, which supplements the migratory protections for migratory birds, Alaskan Natives may engage in subsistence harvesting of migratory birds (Pet. App. 9).

The district court granted summary judgment to the intervenors and dismissed the plaintiffs' claims against the FWS and the state defendants (Pet. App. 33-65). With respect to the intervenors' claims, the court ruled that the AGL superseded the MBTA as applied to the State of Alaska, that the AGL incorporated all of the MBTA's provisions except in subsistence situations, and, accordingly, that subsistence hunting by Alaska Natives is permitted (Pet. App. 9-10, 37-53); it reasoned that the two exceptions to the Secretary's regulatory authority in Section 10 of the AGL—one proscribing restrictions on emergency subsistence hunting, the other proscribing regulations that

TA—"cannot be reconciled" (Pet. the inconsistency is best resolved by the AGL, which provided that exclude the protection of migratory birds in force for 90 days following the provisions pursuant to the AGL, as an example of the MBTA insofar as it applies (Pet. App. 45-47). With respect to plaintiff-Fund and plaintiff-Council hunting agreements that the FWS and had negotiated with the Alaskan and that, because the AGL repealed and to the State of Alaska, those voluntary concessions on the part and that the FWS has no authority (53-54); accordingly, it held that the denying their APA and NEPA claims, 7).

the Fund, the Ninth Circuit reversed (App. 1-32). After rejecting several made by the FWS (*id.* at 6), the the MBTA governs the hunting of that "the MBTA currently does not subsistence hunting of migratory Natives" (*ibid.*). It thus remanded strict court could determine in the the Hooper Bay Agreement and its violate the statutes protecting

question, the court began by noting by the FWIA, the statutes protect expressly "allow[] the Secretary of the nations permitting subsistence hunting if the regulations are in accordance of the treaties that the United States

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Having Alaskan M scheme prohibited district court hunting by MBTA, b App. 22). "[t]he 192 the MBTA prohibited traveling "Section 1 explicit repeal It disagreed the two ex under Section each other hunting prohibited hunting of tory" (*ibid.*) migratory permitted legislative relationship tended to

Canada, the Soviet Union, Japan, 19). It then determined that "[t]he Convention is the most restrictive and [that] all of the Secretary's accord with that treaty" (*id.* at 22). That, under the Canadian Treaty and migratory birds, "the Secretary may permit subsistence hunting for up to three months between September 1 and October 1" (*ibid.*).

The court then addressed that closed season hunting by the Secretary was not permissible under the statutory provisions for migratory birds, the court turned to the question "that closed season subsistence hunting for Native Natives is not regulated by the provisions of the 1925 Alaska Game Law" (Petitioner's brief). The court agreed with the district court that the statute was ambiguous as to its relationship with the Migratory Bird Treaty, noting that Section 10 "explicitly prohibits the Secretary from adopting regulations contrary to the provisions of the 1925 AGL" (*ibid.* (footnote omitted)), but that the 1925 AGL "could be read as an implicit repeal of the 1925 AGL as it applied to Alaska" (*ibid.*). The court then, with the district court's premise that the Secretary's regulatory authority under the 1925 AGL could not be reconciled with the Migratory Bird Treaty, 26), finding that "[t]he subsistence hunting provisions can be read to permit subsistence hunting for all birds which are not migratory" and "emergency subsistence hunting of migratory birds then be permissible insofar as it is consistent with the 1925 AGL" (*ibid.*); and that, while "[t]he 1925 AGL does not clarify the relationship between these two clauses," "Congress intended to implement flexible policies [relating to] migratory birds."

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2. Petitioners also err i
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specific issue, the question
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the statute" (*id.* at 843 (f
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Petitioners' claim that the court of appeals decided the question presented without resolving the issue is therefore without merit — and is not a claim that would suggest that the court of appeals' decision warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MARCH 1988

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